

STATE OF MICHIGAN
COURT OF APPEALS

LANDMARK CONSTRUCTION COMPANY,
INC.,

Plaintiff-Appellee,

v

R. LOCKWOOD CONSTRUCTION, INC. and
HARTFORD FIRE INSURANCE COMPANY,

Defendants-Appellants.

UNPUBLISHED
October 2, 2008

No. 280031
Oakland Circuit Court
LC No. 2006-075677-CK

LANDMARK CONSTRUCTION COMPANY,
INC.,

Plaintiff-Appellant,

v

R. LOCKWOOD CONSTRUCTION, INC. and
HARTFORD FIRE INSURANCE COMPANY,

Defendants-Appellees.

No. 281181
Oakland Circuit Court
LC No. 2006-075677-CK

Before: O'Connell, P.J., and Smolenski and Gleicher, JJ.

PER CURIAM.

In Docket No. 280031, defendant R. Lockwood Construction, Inc. ("Lockwood"), appeals as of right from a circuit court order confirming an arbitration award. In Docket No. 281181, plaintiff appeals as of right from the trial court's order denying its motion for attorney fees. We affirm both orders. These appeals have been decided without oral argument pursuant to MCR 7.214(E).

Lockwood hired plaintiff to perform work on a construction project. It later terminated the contract, which it was permitted to do under the terms of the contract. Plaintiff filed a construction lien against the property for over \$440,000. Defendant disputed the amount that plaintiff claimed was owed and asserted a right to compensation to correct or complete the work left on plaintiff's contract. The contract dispute was submitted to arbitration. The arbitrator

found that both parties were entitled to damages on their respective claims and entered a net award in plaintiff's favor for \$279,432.50. In the meantime, defendant Hartford Fire Insurance Company issued a lien discharge bond covering plaintiff's claim. Plaintiff filed this action to enforce the bond and to confirm the arbitration award. The trial court denied Lockwood's motion to vacate the award. It later denied plaintiff's request for attorney fees under the Construction Lien Act (CLA), MCL 570.1101 *et seq.*

"We review de novo a trial court's decision to enforce, vacate, or modify a statutory arbitration award." *Tokar v Albery*, 258 Mich App 350, 352; 671 NW2d 139 (2003). The court shall vacate an award on motion of a party if the arbitrator exceeded his powers. MCR 3.602(J)(2)(c). An arbitrator exceeds his powers when he acts beyond the material terms of the contract from which his authority is derived, or in contravention of controlling principles of law. *Dohanyos v Detrex Corp (After Remand)*, 217 Mich App 171, 176; 550 NW2d 608 (1996).

An arbitration award should not be vacated simply because there has been an error of law. *NuVision v Dunscombe*, 163 Mich App 674, 684; 415 NW2d 234 (1987). To be reviewable, the legal error must have been "so material or substantial as to have governed the award, and but for which the award would have been substantially otherwise." *Rembert v Ryan's Family Steak Houses, Inc.*, 235 Mich App 118, 165; 596 NW2d 208 (1999), quoting *DAIE v Gavin*, 416 Mich 407, 443; 331 NW2d 418 (1982). In addition, the error must appear on the face of the award or in the reasons for the decision, which are substantially a part of the award. *Dohanyos, supra* at 176; *Smith v Motorland Ins Co*, 135 Mich App 33, 40-41; 352 NW2d 335 (1984). A court cannot engage in contract interpretation, which is an issue for the arbitrator to determine, or review the arbitrator's factual findings. *Konal v Forlini*, 235 Mich App 69, 74-75; 596 NW2d 630 (1999), nor may a court substitute its judgment for that of the arbitrator. *Gordon Sel-Way, Inc v Spence Bros, Inc*, 438 Mich 488, 497; 475 NW2d 704 (1991).

Defendant Lockwood contends that by awarding damages to each party, the arbitrator made an award that contradicted the terms of the parties' contracts and, thus, he exceeded his powers. Although an arbitrator has the power to fashion a remedy, unless precluded from doing so by the parties or their contractual agreement, *Police Officers Ass'n of Michigan v Manistee Co*, 250 Mich App 339, 346; 645 NW2d 713 (2002), the remedy cannot conflict with the terms of the agreement. See *Ehresman v Bultynck & Co, PC*, 203 Mich App 350, 355; 511 NW2d 724 (1994).

The parties' contract provided that in the event plaintiff breached the contract, defendant could take over and complete the work "charging the costs thereof to Subcontractor. . . . Under such circumstances, the Contractor shall also have the right to withhold any and all payments to the Subcontractor until all such cost charges have been paid in full to the Contractor." If it was determined that Lockwood improperly terminated plaintiff's contracts, then plaintiff was entitled to "be paid based on the percentage or quantity of the Work completed through the date of termination." Lockwood contends that because it prevailed on its counterclaim for the cost of completion, the arbitrator must have necessarily concluded that plaintiff breached the contract and that Lockwood's termination of the contract was therefore proper. If the termination was not improper, then plaintiff was not entitled to payment for work completed before the termination.

If Lockwood's interpretation of the contract were correct, then a dual award would have been improper. However, the arbitrator may have interpreted the provisions differently yet still have been consistent with the terms of the agreement. In the case of a proper termination for cause, the contract gave Lockwood the right to withhold payment to plaintiff until plaintiff reimbursed Lockwood for the cost of completion; the contract does not state that plaintiff forfeits payment if Lockwood must complete the contract. In the case of an improper termination, plaintiff is entitled to payment for the work completed before termination, but is not liable to Lockwood for the cost of completion. Thus, the arbitrator could have determined that the contract permitted plaintiff to recover payment for work performed, despite its breach, to the extent the amount due exceeded the cost of completion incurred by Lockwood. Because such an interpretation is consistent with the contract, and contract interpretation is a matter for the arbitrator, Lockwood failed to establish that the arbitrator exceeded his powers, and the trial court properly confirmed the award.

The trial court's decision whether to award attorney fees under the CLA is reviewed for an abuse of discretion. *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 381; 652 NW2d 474 (2002). "The abuse of discretion standard applies where there is not a single correct outcome, so the trial court should be affirmed as long as the outcome is reasonable and principled." *Patrick v Shaw*, 275 Mich App 201, 204; 739 NW2d 365 (2007), *aff'd* 480 Mich 1050 (2008). Statutory interpretation is a question of law that is reviewed *de novo* on appeal. *Van Reken v Darden, Neef & Heitsch*, 259 Mich App 454, 456; 674 NW2d 731 (2003).

A construction lien is a lien against real property given by statute to a person, including a subcontractor, who provides an improvement to that property but is not paid. See MCL 570.1107(1). The lien attaches to the entire interest of the owner who contracted for the improvement. MCL 570.1107(1) and (2). To perfect a lien, the subcontractor must record a claim-of-lien form in the register of deeds office within 90 days after the subcontractor last furnished labor or material for the improvement, and it must serve a copy on the property owner or his designee within 15 days after recording. MCL 570.1111(1) and (5). The lien is enforced by filing suit for foreclosure within one year after the date the claim of lien was recorded. MCL 570.1117(1). A subcontractor's claim of lien may be "vacated and discharged if a bond, with the lien claimant as obligee, is filed with the county clerk for the county in which the property covered by the lien is located . . ." MCL 570.1116(1). "The bond shall be in the penal sum of twice the amount for which the lien is claimed and shall be conditioned on the payment of any sum for which the obligee in the bond may obtain judgment on the claim for which the claim of lien was filed." *Id.* "The bond may be either a cash bond executed by a principal, or a surety bond executed by a principal and a surety company authorized to do business in this state." *Id.* Once the bond is filed and approved, the county clerk issues a certificate indicating that "a good and sufficient bond has been filed," and the recording of the certificate discharges the lien. MCL 570.1116(2). The obligee may file an action to enforce a claim under the bond and recover judgment "against all or any of the obligors." *Id.* It is plaintiff's position that its claim to enforce the bond was not part of the arbitration proceedings and, therefore, that provision of the award denying attorney fees to both parties does not apply; thus it may recover attorney fees pursuant to MCL 570.1118. That statute provides, in pertinent part:

(1) An action to enforce a construction lien through foreclosure shall be brought in the circuit court for the county where the real property described in the claim of lien is located. . . .

(2) In each action in which enforcement of a construction lien through foreclosure is sought, the court shall examine each claim and defense that is presented, and determine the amount, if any, due to each lien claimant The court may allow reasonable attorneys' fees to a lien claimant who is the prevailing party. The court also may allow reasonable attorneys' fees to a prevailing defendant if the court determines the lien claimant's action to enforce a construction lien under this section was vexatious. . . .

We conclude that MCL 570.1118(2) is not applicable to this action. It pertains solely to an action to foreclose a construction lien by a lien claimant. If the court determines that a lien claimant is entitled to a construction lien and the amount adjudged to be due has not been paid, the court may issue a judgment of foreclosure ordering the sale of the property to satisfy the lien. MCL 570.1121(1). Thus, an action to foreclose a lien exposes real property to liability. It is distinct from an action for breach of the contract from which the lien arose, although the two actions may be joined. See MCL 570.1117(5). By virtue of the surety bond, plaintiff's lien was discharged and the real property is no longer subject to liability. See *E R Zeiler Excavating, Inc v Valenti Trobec Chandler Inc*, 270 Mich App 639, 648; 717 NW2d 370 (2006). Therefore, plaintiff no longer had a lien that could be foreclosed and its complaint did not include a claim for "enforcement of a construction lien through foreclosure." See MCL 570.1118. Rather, it sought a judgment against defendants under the surety bond, which is in the nature of a contract action. *Zeiler Excavating, supra* at 48–49. While such an action may be authorized under MCL 570.1116 of the CLA, neither that section nor MCL 570.1118(2) authorizes the recovery of attorney fees in a bond enforcement action. Because a "party must prevail on the lien foreclosure action" to recover attorney fees under MCL 570.1118(2), *H A Smith Lumber & Hardware Co v Decina*, 480 Mich 987, 988; 742 NW2d 120 (2007), and plaintiff's complaint did not include a claim for enforcement of a lien through foreclosure, plaintiff did not prevail on such a claim and thus was not entitled to attorney fees. Although the trial court denied the motion on other grounds, we will not reverse where the trial court reached the right result, even if for the wrong reason. *Netter v Bowman*, 272 Mich App 289, 308; 725 NW2d 353 (2006).

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Elizabeth L. Gleicher